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BEFORE THE

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Federal Communications Commission RECEIVED

WASHINGTON, D.C.

JAN - 5 1994

In re Applications of )

MM Docket No. 93-94 )

SCRIPPS HOWARD )  
BROADCASTING COMPANY )

File No. BRCT-910603KX )

For Renewal of License of )  
WMAR-TV, Baltimore, Maryland )

and )

FOUR JACKS BROADCASTING, INC. )

File No. BRCT-910903KE )

For Construction Permit for a )  
New Television Facility on )  
on Channel 2 at )  
Baltimore, Maryland )

To: The Honorable Richard L. Sippel  
Administrative Law Judge

**CONSOLIDATED REPLY TO OPPOSITIONS TO  
PETITION TO REOPEN THE RECORD AND ENLARGE THE ISSUES**

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**SUMMARY**

The Oppositions filed by Scripps Howard and the Mass Media Bureau entirely fail to refute or excuse the facts established in Four Jacks' Petition to Reopen the Record and Enlarge the Issues. Those facts demonstrate that Scripps Howard lied and concealed facts with respect to correspondence between Emily Barr and NBC, and handwritten notes allegedly prepared for trial in 1992 by WMAR-TV's former Public Affairs Director. Scripps Howard's motive to conceal these documents is obvious, as those documents show that critical portions of Scripps Howard's renewal expectancy showing -- far from being supported by any contemporaneous documentary proof -- were constructed in 1992, a year after the Renewal Period in this case. The full extent and nature of Scripps Howard's misrepresentations and concealment became apparent only after Ms. Barr testified at hearing. Four Jacks's Petition can hardly be considered untimely when it was filed within 15 days of receipt of the transcript of Ms. Barr's testimony.

Scripps Howard provides no colorable justification for its conduct. Its primary defense regarding the NBC correspondence is the arrogant and factually incorrect claim that Four Jacks was never entitled to the documents in the first place. Scripps Howard has no response to what might be its most patent misrepresentation with respect to the NBC correspondence -- its assertion, less than 24 hours before the correspondence was physically produced to Four Jacks, that the NBC correspondence was not in the possession of WMAR-TV and might not even exist.

On the subject of the Covington notes, Scripps Howard attempts to rationalize its lies by concocting an incredible factual theory never before advanced: that there were two types of Covington "notes" -- her 1992 handwritten notes, and her earlier calendar. Yet Ms. Barr's testimony consistently drew a sharp distinction between Ms. Covington's "calendar" and her later "notes." She never suggested the explanation that Scripps Howard now advances, even when practically invited to do so.

Scripps Howard's Opposition only highlights its cavalier attitude toward disclosing critical evidence in this case. Its Opposition, as well as the Bureau's, should be rejected, and the requested issues should be added.

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To: The Honorable Richard L. Sippel  
Administrative Law Judge

**CONSOLIDATED REPLY TO OPPOSITIONS TO  
PETITION TO REOPEN THE RECORD AND ENLARGE THE ISSUES**

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys and pursuant to Sections 1.229 and 1.294(c) of the Commission's Rules, hereby replies to the December 22, 1993 Oppositions filed by Scripps Howard Broadcasting Company ("Scripps Howard") and the Mass Media Bureau ("Bureau") to Four Jacks' Petition to Reopen the Record and Enlarge the Issues ("Petition").<sup>1/</sup> The Bureau simply fails to recognize the import of the egregious misrepresentation and lack of candor of Scripps

<sup>1/</sup> Scripps Howard's Opposition was served on both Four Jacks and the Bureau by hand. In a letter dated December 23, 1993, counsel for Scripps Howard stated that this hand service was inadvertent, and that it would have no objection to the filing of replies on this date (the date replies would have been due had service been effected by mail).

Howard with respect to critical evidence in this case. As for Scripps Howard, its Opposition only highlights the arrogant gamesmanship with which Scripps Howard has treated Four Jacks' efforts to reach the truth in this case. Both Oppositions should be rejected, and the issues requested by Four Jacks should be added.

**I. Four Jacks' Petition Is Based on Newly Discovered Evidence and Was Timely Filed**

1. Scripps Howard baselessly asserts that Four Jacks' Petition is not based on "newly discovered evidence," and therefore that it does not meet the standard for reopening of the record. True, Scripps Howard made misrepresentations and lacked candor at earlier stages of this proceeding. But only after Ms. Barr's November 8-9, 1993 hearing testimony did the full extent of Scripps Howard's coverups become clear. For example, only upon Ms. Barr's hearing testimony did Four Jacks discover that Ms. Barr's correspondence with NBC was retained in a file at WMAR-TV until it was finally produced to Four Jacks in late October 1993.<sup>2/</sup> See Petition at 7-8, citing Tr. 769. Only upon Ms. Barr's hearing testimony did Four Jacks discover that handwritten notes of Janet Covington documenting purported ascertainment interviews -- which Four Jacks was led to believe were taken by Ms. Covington when she left the station in 1991 -- were in Ms. Barr's exclusive possession in 1992 and were retained

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2/ All that Four Jacks was told at the October 27, 1993 prehearing conference was that the NBC correspondence had just recently been located. Four Jacks was not told then that the correspondence had been in station files all along.

at the station for some time thereafter. Petition at 11-13, citing Tr. 582-83; 666-69. Following this newly discovered information, Four Jacks promptly filed its Petition within 15 days of receiving the transcript of Ms. Barr's hearing testimony. It is customary to wait until the transcript is received and, in fact, Four Jacks needed the transcript to support its pleading. Four Jacks hardly can be accused of lacking diligence under these circumstances and, in fact, Commission precedent establishes that Four Jacks' Petition was timely. See Chicagoland TV Co., 5 FCC Rcd 154, 155 (Rev. Bd. 1966) (petition to enlarge issues accepted where facts giving rise to petition were not fully disclosed until cross-examination of witness, and petition was filed promptly after transcript of testimony became available to movant).

2. Nonetheless, Scripps Howard argues that simply because the facts on which Four Jacks' Petition is based came out during the hearing, Four Jacks could have discovered these facts "'with due diligence' at the time of the hearing." Were this the standard, further issues raised by an applicant's hearing testimony could never be explored. Four Jacks cited in its Petition two of the many cases in which the Commission has added issues based on misrepresentations in hearing testimony. See Petition at 3; see also Breeze Broadcasting Co., Ltd., 8 FCC Rcd 1835, 1840 (1993) (proceeding remanded for hearing on misrepresentation/lack of candor issue based upon conflicting hearing testimony of applicant principals); Frank Digesu, Sr., 7 FCC Rcd 5459 (1992) (case remanded to explore applicant's

potential misrepresentations in hearing testimony); Radio Cicero, Inc., 44 R.R.2d 1657, 1662-63 (ALJ 1979) (issue added by ALJ to explore applicant principal's potential misrepresentations in hearing testimony).<sup>3/</sup>

3. Moreover, it is simply not true that the matters raised in Four Jacks' Petition "indeed were" considered at the hearing. In Omaha TV 15, Inc., 4 FCC Rcd 730, 731 (1988), on which Scripps Howard relies, an applicant sought to reopen the record and enlarge the issues concerning alleged false representations about stock transfers among the principals of an opponent. The Commission denied the request, pointing out that the applicant's principal "testified at length" about the stock transfers and his percentage interest in the applicant. In stark contrast, Four Jacks was precluded at hearing from exploring, inter alia, (a) Scripps Howard's October 26, 1993 pleading in which it was represented (one day before the correspondence was produced) that the NBC correspondence was not in the possession of WMAR-TV and that it "may or may not exist" (Tr. 774-75); (b) what Ms. Barr did with the Covington notes (Tr. 683); and (c) why Scripps Howard had not disclosed that the Covington notes had ultimately

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<sup>3/</sup> Moreover, even if Four Jacks' Petition were considered untimely, Section 1.229(c) of the Commission's Rules provides that a motion to enlarge will be considered where "it raises a question of probable decisional significance and . . . substantial public interest importance." Given Scripps Howard's continuous pattern of misrepresentation and lack of candor as to critical documents in this case, as established in Four Jacks' Petition and herein, the Petition plainly meets this standard.



been destroyed (Tr. 670-71).<sup>4/</sup> Four Jacks plainly has brought the facts in its Petition forward in a prompt and diligent matter, and has been denied the opportunity to raise these matters earlier.

**II. Scripps Howard Lied and Lacked Candor With Respect to the NBC Correspondence and the Covington Notes, and Its Opposition Only Highlights Its Deception**

4. The record in this proceeding establishes that Scripps Howard has virtually no contemporaneous documentation of the ascertainment efforts that purportedly took place at WMAR-TV between May 30 and September 3, 1991, or the process by which the station tied its programming to its identification of issues. The documents at issue here -- 1992 correspondence between Emily Barr and NBC, and notes allegedly prepared in 1992 (but which have never been produced) by Ms. Janet Covington, WMAR-TV's Public Affairs Director during the aforementioned Renewal Period -- indicate that critical portions of Scripps Howard's renewal expectancy showing relating to ascertainment and responsive programming, far from being based on contemporaneous documentary proof, were constructed nearly a year after the Renewal Period in preparation for this hearing.

5. It clearly was in Scripps Howard's interest to ensure that the documents in question never became part of the record in this case, for evidence that Scripps Howard's renewal expectancy

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<sup>4/</sup> Given that Four Jacks was precluded from exploring these critical matters at hearing, Scripps Howard hardly can rely on the Judge's comments at Tr. 670-71 as any type of resolution of Four Jacks' claims. See Scripps Howard Opposition at 9.

showing was constructed one year after the fact would undermine the reliability of its direct case on the renewal expectancy issue, and would in fact demonstrate an absence of any ongoing process of ascertaining community needs and tying responsive programming to those needs. Thus, Scripps Howard and its representatives lied and concealed facts throughout the course of this proceeding as to both the nature and the very existence of those documents. As set forth below, Scripps Howard's Opposition offers no colorable justification for its actions.

**A. The NBC Correspondence**

6. Scripps Howard's attempted defense of its misrepresentation and lack of candor relating to the NBC correspondence is a combination of obfuscation and arrogance. Its primary defense is that "Four Jacks was never entitled to copies of the NBC correspondence in the first place." Scripps Howard Opposition at 6. This contention is not only irrelevant, it is wrong. Request (b) of Four Jacks' original document production request asked, among other things, for "Documents reflecting the compilation of responsive programming lists." See Scripps Howard Opposition, Exh. B, at 5. "Responsive programming lists" are precisely what Ms. Barr requested and received from NBC in the summer of 1992, and thus the NBC correspondence falls squarely within the scope of Four Jacks' document production request. That Scripps Howard chooses to ignore this plain language in its Opposition underscores that pleading's disingenuity, if not outright deceit.

7. Scripps Howard proceeds to offer a series of misguided complaints about certain allegations regarding the NBC correspondence. See Scripps Howard Opposition at 6-7. Notwithstanding these complaints, however, it is absolutely true that Emily Barr commenced a massive effort in the summer of 1992 to construct a renewal expectancy showing for WMAR-TV's performance during the Renewal Period (May 30-September 3, 1991). Barr's correspondence with NBC was an integral part of that effort. It is equally true that at her deposition, Ms. Barr testified she asked NBC for programming information in a telephone call, and that only after repeated questioning did Ms. Barr reveal the existence of written correspondence with NBC.<sup>5/</sup>

8. Scripps Howard arrogantly attempts to defend Barr's deposition testimony as to the existence of the NBC correspondence. It claims that "Four Jacks never asked Ms. Barr to search for the correspondence, which was not within any discovery request." Scripps Howard Opposition at 7. First, as noted above, the NBC correspondence was foursquare within the scope of Four Jacks' document production motion. Second, it is not Four Jacks' responsibility to request searches for documents about which Ms. Barr and Scripps Howard have peculiar knowledge.

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<sup>5/</sup> In this regard, Four Jacks did not "juxtapose[] Ms. Barr's [deposition] response regarding how she originally requested information from NBC . . . with her response regarding how she subsequently provided NBC with a list of issues after the network responded to her telephone inquiry." See Scripps Howard Opposition at 6-7. Nowhere in the pertinent deposition testimony (see Petition, App. A, at 105-09), prior to finally admitting that she transmitted a written list of issues by telecopier, does Barr ever draw a distinction between her original telephonic information request and the written issues list she forwarded.

In this regard, Scripps Howard's claim that "Scripps Howard had no reason to search for the NBC correspondence until over three months later" is sheer nonsense. Ms. Barr was asked point-blank at her deposition about the NBC correspondence. Moreover, Bureau counsel asked Ms. Barr at the end of her deposition whether the questioning had brought to mind other documents she might have overlooked. See Petition at 5-6, citing Barr Dep. Tr. 144.

9. Particularly given the extensive questioning at the deposition, it was plainly incumbent on Ms. Barr to ascertain and correct any inaccuracies in her deposition promptly, not to wait until the correspondence was once again raised as an issue. Scripps Howard's argument on this point once again illustrates the cavalier manner in which it has dealt with material evidence in this case.

10. Indeed, for all the obfuscation that it offers, Scripps Howard has no response to what may be its most patent misrepresentation with respect to the NBC correspondence. Specifically, in a pleading filed on October 26, 1993 -- less than 24 hours before it produced the NBC correspondence to Four Jacks -- Scripps Howard was claiming that those documents "were not in the possession of WMAR-TV"; that they "may or may not exist"; and that "a search for the documents is likely to take some time and cause delay." See Petition at 6-7. The Bureau totally ignores these misrepresentations in its Opposition. Significantly, Scripps Howard does not deny that when it made these representations on October 26, it in fact had full knowledge that the NBC correspondence existed and was in WMAR-

TV's possession.<sup>6/</sup> All that Scripps Howard offers in defense is the lame contention that "Four Jacks has offered no support for its bare supposition that Scripps Howard was aware that the NBC correspondence existed at the time the pleading was filed." This feeble attempt at burden-shifting, however, only highlights Scripps Howard's inability to provide any justification for its October 26 misrepresentations.<sup>7/</sup>

11. In sum, Scripps Howard made a series of patent misrepresentations concerning the NBC correspondence. Its Opposition offers only smokescreens as a defense, and its claims must be rejected.

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6/ Scripps Howard hardly can claim otherwise. It cannot be overemphasized that Scripps Howard's denials of the existence of the NBC correspondence occurred in a pleading Scripps Howard filed at approximately noon on October 26, 1993. Copies of the correspondence were physically delivered to counsel for Four Jacks at approximately noon on October 27, 1993. Given this timing, it is evident that Scripps Howard at least knew of the existence of the NBC correspondence at WMAR-TV on October 26. It is more likely that WMAR-TV had the documents in hand on that date to forward to Washington for production the next day, if the documents had not been forwarded already.

7/ Scripps Howard's claim that it "voluntarily corrected the record without prompting less than twenty-four hours after its pleading was filed" (Scripps Howard Opposition at 8) is an amazing mischaracterization of the facts. Scripps Howard's eleventh-hour admission at the October 27, 1993 prehearing conference that WMAR-TV possessed the NBC correspondence was hardly "voluntary"; Scripps Howard was essentially forced to admit the documents' existence because a prehearing conference had been convened on that very subject. Furthermore, Scripps Howard's production of the NBC correspondence was just the opposite of "voluntary" -- the Judge affirmatively ordered the production of those documents.

**B. The Covington Notes**

12. Four Jacks' Petition demonstrated that Scripps Howard also lacked candor and misrepresented facts concerning the existence and nature of written materials (never produced in this proceeding and now apparently destroyed) by Ms. Janet Covington, WMAR-TV's former Public Affairs Director. In an attempt to rationalize these offenses, Scripps Howard concocts an incredible factual theory never before advanced in this case: that the Covington "notes" that Scripps Howard claimed had been possessed by Ms. Covington when she left WMAR-TV's employ in December 1991 and "were not retained in any files at WMAR-TV" (see Petition, App. D) were in fact Ms. Covington's personal calendar, as distinguished from the "notes" that Ms. Covington allegedly prepared from materials in her calendar and gave to Barr in 1992 for the purpose of Barr's ascertainment reconstruction project. In other words, Scripps Howard now claims for the first time that there were two types of Covington notes: (i) Ms. Covington's calendar "notes"; and (ii) the Covington notes that Barr used in 1992 to prepare WMAR-TV's ascertainment exhibit.<sup>8/</sup>

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<sup>8/</sup> Again, Scripps Howard is simply wrong in alleging that the "second type of notes . . . did not fall within the confines of Four Jacks' discovery requests or the Presiding Judge's discovery order." Scripps Howard Opposition at 10. Request (b) of Four Jacks' motion for production of documents squarely seeks "Documents describing the conduct and results of ascertainment efforts." *Id.*, Exh. B, at 5. Scripps Howard is equally wrong to claim that these notes "are classic work-product, and thus would be privileged from disclosure to Four Jacks even if they did exist." First, Scripps Howard had the opportunity in June 1993, in the course of document production, to claim work product for these notes. Scripps Howard did not even disclose their  
(continued...)

13. Scripps Howard's newly advanced theory does not withstand scrutiny.<sup>2/</sup> Despite Scripps Howard's blithe contention that "[i]t is apparent from the record that there are two types of notes that Ms. Covington made relating to ascertainment" (Scripps Howard Opposition at 9), there is not the slightest inkling anywhere in Ms. Barr's testimony on the subject that both Ms. Covington's calendar and her 1992 handwritten material were "notes." Quite the contrary, Barr's testimony consistently draws a sharp distinction between Ms. Covington's "calendar" and her subsequent "notes." Furthermore, Ms. Barr testified that she had not seen Ms. Covington's calendar in 1992 and she did not know what the calendar contained. The following portions of Ms. Barr's testimony are illustrative of the folly of Scripps Howard's newly advanced defense:

Q: And you looked at the calendars of yourself, Mr. Kleiner, and Ms. Velleggia. Did you look at Ms. Covington's calendar?

A: I looked -- Ms. Covington at that point had left the employ of WMAR. So what I asked her to do was if she could find her calendar. I did not know at that time that I would need the actual calendar. What, what Ms. Covington did was she wrote down for me in longhand the meetings that she had held, who they were with, the dates that they were on,

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8/(...continued)

existence, let alone assert a work product claim. Moreover, during the hearing the Judge ruled that even were the Covington notes protected by the work-product privilege, sufficient cause existed for those notes (or at least the draft of Scripps Howard's ascertainment exhibit incorporating the Covington notes) to be produced. Tr. 593.

9/ It is curious that the Bureau, which has absolutely no personal knowledge as to either the Covington documentation or Ms. Barr's state of mind at hearing, offers the same "two types of notes" theory to explain Scripps Howard's misrepresentations. See Bureau Opposition at 4.

and what was discussed in general in those meetings. So I never actually saw her calendar.

Q: You never actually saw her calendar, but she gave you some notes in longhand?

A: That's correct.

Tr. 577-78 (emphases added).

\* \* \*

JUDGE SIPPEL: This is when you were doing the formatted write-up for the attorneys?

[MS. BARR]: Right. I kept the calendars. What I had from Ms. Covington was just notes. I went back to her much later, at the request of counsel, to ask her for her actual calendar from which she had pulled these notes. Unfortunately, she had been -- she had done some housecleaning or something. She had -- She threw it away or she could not, she could not find it. I asked her to go back and look for it twice and she could never locate it, the actual calendar.

JUDGE SIPPEL: The calendar -- She could never locate the calendar?

[MS. BARR]: No, she, she, she had the calendar --

JUDGE SIPPEL: Oh.

[MS. BARR]: -- because that's how she had originally given me these notes. She never actually gave me her calendar. She used her calendar in order to provide me with these notes.

JUDGE SIPPEL: What did you ask her for?

[MS. BARR]: Originally?

JUDGE SIPPEL: Yes.

[MS. BARR]: Originally, I asked her for her calendar. And when she asked me why, I explained what was going on and that I needed to know what interviews she had conducted. And she said to me I better write it out for you because you'll never be able to decipher my calendar. So she wrote me these handwritten notes which indicated the date . . . .

Tr. 583-84 (emphases added).



\* \* \*

JUDGE SIPPEL: Well, then how did the notes get to you? Or let me ask the question this way. On what did Ms. Covington base the notes that she wrote up and gave to you that she ultimately threw away?

[MS. BARR]: They were based on her calendar, but that was done much earlier than the time that I actually asked her for her calendar. As I said before, the reason why she didn't give me the actual calendar at the time that I was putting this together is because her -- I know this sounds preposterous, but her handwriting and her recordkeeping was very unique and difficult to decipher. And so she wrote out for me in longhand what had transpired as far as her ascertainment interviews during the relevant period and she gave it to me in the form of these handwritten notes.

That was early in the summer of 1992 when I requested that from her. She -- I don't, I don't recall ever saying to her save your calendar for me. I don't recall that I said save it and I don't recall that I said don't save it.

JUDGE SIPPEL: But when she said that she was going to give you the handwritten notes and not the calendar, did you ever think to transmit that information to the attorneys to get some advice or some guidance or -- I mean, this sounds like it was done in an awful loose way.

[MS. BARR]: I don't -- I, I really don't, I really don't think that I thought of that.

Tr. 589-90 (emphases added).

\* \* \*

Q: Now, once you gathered -- and did you call Janet Covington in 1992?

A: Yes, I did.

Q: You asked for her calendar?

A: Yes, I did.

Q: And that was when she told you that you wouldn't be able to read it so she would make some notes for you?

A: Well, she first asked me why I wanted it and I explained to her that I was looking for background information on people she had done ascertainment interviews with and that her calendar would, would -- I asked her if her calendar would help her recollect who she had spoken with. She said yes, it would and why don't -- she offered to make the notes for me. She said why don't I, why don't I go through my calendar for that four months and write down for you who I met with, were I met with them and so forth?

Q: Did you ever personally see Ms. Covington's calendar?

A: I have seen it in the past. I did not see it in 1992.

Q: Do you know if Ms. Covington used anything other than her calendar to make her notes?

A: To the best of my knowledge, no.

\* \* \*

Q: So the notes that she gave you in -- to the best of your knowledge, the notes that she gave you in 1992 were things from her calendar? Correct?

A: Um-hum.

Tr. 659-61 (emphases added).

14. The above testimony plainly establishes that Ms. Barr had just one set of "notes" in mind -- the notes that Ms. Covington prepared for her in 1992 -- as clearly distinguished from Covington's earlier calendar. Ms. Barr made that distinction herself, and showed not the least bit of confusion in responding to questions from both Four Jacks' counsel and the Presiding Judge making that same distinction. What is more, Ms. Barr had a perfect opportunity at hearing -- when confronted with the language in footnote 6 of her direct testimony -- to proffer the explanation that Scripps Howard now provides for the first time in its Opposition: specifically, that "the statement in her

direct testimony was referring to the notes on Ms. Covington's calendar." Scripps Howard Opposition at 11. That is not the explanation that Ms. Barr gave at hearing:

Q: Ms., Ms. Barr, in Footnote 6 of your exhibit SH3-16 where you say, "It did not occur to me to preserve Ms. Covington's handwritten notes," is there some reason that the destruction of the handwritten notes was not disclosed in response to the motion for production of documents?

A: There was no reason, because I just didn't think it was -- I just didn't think it was a relevant issue.

Tr. 594.

15. Obviously, Scripps Howard is engaged in a post hoc rationalization of its misrepresentations with respect to the Covington notes that lacks any support in the record. As her testimony demonstrates, in Ms. Barr's mind there was one set of notes. Scripps Howard lied and concealed facts throughout the course of this proceeding as to the nature of these notes and what had been done with them. Its motive to conceal is apparent -- Scripps Howard did not want evidence in the record showing that its demonstration of Covington's purported ascertainment efforts was based on documentation (i.e., Covington's 1992 "notes") compiled a year after the fact, and which had been discarded by Ms. Barr after preparing for this hearing. It therefore affirmatively misled Four Jacks into thinking the Covington notes were contemporaneous with the 1991 Renewal Period and had been discarded by Covington much earlier than they

actually were.<sup>10/</sup> Scripps Howard's conduct goes to the very core of the renewal expectancy issue. Its continued lack of candor cannot be tolerated, and demands the addition of character issues.

### Conclusion

Scripps Howard's Opposition only serves to further illustrate Scripps Howard's cavalier attitude toward disclosing critical evidence in this case, and its willingness to dissemble to cover up its failings. The Opposition attempts to cloud over -- but in no way refutes -- Scripps Howard's continuing pattern of misrepresentation and lack of candor. The Bureau's Opposition

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<sup>10/</sup> Scripps Howard asserts that "[a]ny prejudice caused by Ms. Barr's inadvertent disposal of the work product notes was, of course, cured during the hearing when the Presiding Judge ordered Scripps Howard to produce the 'next step' in the chain between those notes and Attachment E to Ms. Barr's testimony . . . ." Scripps Howard Opposition at 12. This argument is both irrelevant and baseless. In the first place, Scripps Howard's misrepresentation and lack of candor cannot be "cured." Moreover, Four Jacks was prejudiced by the destruction of Covington's notes. Because of their absence, there is no way to ascertain precisely what information, if any, was contained in Ms. Covington's calendar -- the only contemporaneous document that could possibly show what Ms. Covington might have done in the way of ascertainment.

is similarly lacking in merit. Both Oppositions should be rejected, and the record should be reopened for a hearing on the issues requested by Four Jacks.

Respectfully submitted,

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Dated: January 5, 1994

**CERTIFICATE OF SERVICE**

I, Valerie A. Mack, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, do hereby certify that true copies of the foregoing "CONSOLIDATED REPLY TO OPPOSITIONS TO PETITION TO REOPEN THE RECORD AND ENLARGE THE ISSUES" were sent this 5th day of January, 1994, by first class United States mail, postage prepaid, to the following:

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